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No. 03-693

IN THE

Supreme Court of the United States

SCOTTSDALE UNIFIED SCHOOL DISTRICT NO. 48, *ET AL.*,

Petitioners,

v.

JOSEPH J. HILLS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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KEY TO ABBREVIATIONS

Dkt.	=	Docket entry number (D. Ariz.)
ER	=	Excerpts of Record (9th Cir.)
Pet.	=	Petition for Certiorari
Pet. App.	=	Appendix to Petition for Certiorari
SUSD	=	Scottsdale Unified School District

INTRODUCTION

In this case the court of appeals correctly invalidated a school district's blatant viewpoint discrimination against private speech. There is no warrant for Supreme Court review of this straightforward application of settled law.

The school district's petition for certiorari primarily complains about one small portion of the opinion below. As discussed below, petitioners' contentions rest on a misreading of that opinion, present a premature issue, and do not present an actual controversy between the parties.

To illustrate these points, it is necessary first to recap the facts and the course of proceedings.

STATEMENT

1. Nature of the Case

This is an "equal access" case. Respondent Joseph J. Hills, plaintiff-appellant below, challenged the constitutionality of a school district's literature distribution policy on its face and as applied. The school district allows private nonprofit community organizations to submit to schools, for distribution to students, a wide range of materials promoting events and activities. The school district, however, categorically forbids distribution of fliers of a "religious nature." Although the school district routinely approves the distribution of fliers promoting summer camps, the school district forbade Hills from distributing a brochure promoting a summer camp that included, among nineteen total courses, two classes on "Bible Heroes" and "Bible Tales." Neither the Bible nor religion are themselves forbidden topics; rather, it was the religious *viewpoint* of these two planned summer camp courses that the school district found objectionable.

Hills brought suit in federal court challenging the school

district's viewpoint-discriminatory policy and practice. Hills raised, *inter alia*, federal constitutional claims alleging violations of his right to free speech, free exercise of religion, equal protection of the law, due process of law, and freedom from the establishment of religion. Hills requested declaratory and injunctive relief and damages.

The district court rejected Hills's claims on cross-motions for summary judgment, but the Ninth Circuit unanimously -- and correctly -- reversed on the basis that the school district had violated Hills's federal constitutional right to free speech.

2. Pertinent Facts

Petitioner Scottsdale Unified School District (SUSD) has a policy[1] and practice of allowing outside groups to distribute, through the school's literature distribution system, brochures and other promotional literature to students at SUSD schools to take home to their parents. The policy authorizes, as a community service, the dissemination of material regarding events and activities of interest to students and their parents.

SUSD approved about one hundred fliers for distribution in each of the years 1999 and 2000. ER 196-206. Events and activities commonly promoted in the fliers included: summer camps; sports leagues; art classes, performances, or exhibits;

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[1]Petitioners include in their Petition Appendix only the policy adopted in or about March, 1998. Pet. App. 49. That policy was modified several times thereafter. In 1999, SUSD officials determined that SUSD would only allow distribution of materials on behalf of nonprofit and governmental programs or organizations. ER 84, 93, 135. On Apr. 24, 2000, in response to petitioner Hills's brochure, SUSD added a requirement that all fliers contain a disclaimer. ER 192-93. On Oct. 17, 2000, SUSD formally adopted a new policy on the distribution of promotional materials. ER 187, 191. Notably, this new policy omitted the previous ban on commercial materials, though it retained the requirement that materials be "non-religious in nature and content." ER 187.

various YMCA activities; and, a miscellany of other matters such as a breast cancer awareness walk, recruitment of foster parents, a college fair, a town meeting on funding for education, a fall festival at a church, a holiday lights display, Halloween safety tips, and even a birthday party for the Teen Night Director of a Boys and Girls Club. The only basis SUSD *ever* asserted for declining to distribute a flier (aside from respondent Hills's camp flier) was failure to comply with either the (former) nonprofit/noncommercial rule or the (subsequent) disclaimer requirement. ER 90-91, 195-206 & nn.2, 4. *See supra* note 1.

Respondent Hills is a Scottsdale, Arizona, resident who had approximately seven years experience teaching in after-school programs, including programs for which promotional materials had been distributed pursuant to SUSD policy. In 1999, Hills decided to offer a summer camp through "A Little Sonshine from Arizona," a nonprofit corporation of which Hills is president. Hills intended to advertise the camp via a Camp Brochure, Pet. App. 50, to be distributed through SUSD schools. As indicated in the Brochure, the summer camp would offer nineteen courses. Two of the courses, "Bible Heroes" and "Bible Tales," included religious content in their titles and course descriptions.

Hills initially obtained SUSD approval for the distribution of his Camp Brochure. SUSD subsequently revoked permission, however, and ultimately forbade distribution of the Camp Brochure, asserting concern about violating the Establishment Clause, ER 194. SUSD officials informed Hills that if he wished to distribute his brochure, he would have to remove the listings and descriptions of the two Bible classes as well as remove the accompanying religious graphics (a Bible, a cross, and a dove carrying an olive branch). ER 149, 155-56, 194.

Hills intends to advertise and operate similar summer camps in the future. It is undisputed, however, that if his future camp

brochures contain similar religious content, SUSD would not allow their distribution. ER 195.

It is undisputed that Hills's nonprofit corporation is an entity eligible to distribute literature under the SUSD policy. It is likewise undisputed that SUSD has approved summer camp fliers, fliers containing course listings and descriptions, and fliers containing graphics (including, *inter alia*, a dove, a menorah, and a witch). It is undisputed that even religious topics are permitted in fliers, so long as the *viewpoints* from which the topics are addressed are historical, literary, etc., but not *religious*. ER 120-21, 124, 153, 155.[2]

3. Course of Proceedings and Disposition Below

Respondent Hills filed his complaint in federal district court in Arizona on June 8, 2000. After further pleadings and discovery, the parties stipulated to much of the facts and filed cross-motions for summary judgment. In an order filed November 5, 2001, the district court denied Hills's motion for summary judgment and granted the motion of petitioners (defendants-appellees below) for summary judgment. Pet. App. 27. A separate final judgment was entered the same day.[3]

Hills appealed. On May 22, 2003, a unanimous panel of the Ninth Circuit reversed and ruled in favor of Hills.

The Ninth Circuit panel of Judges Canby, Hawkins, and

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[2]As SUSD Superintendent Barbara Erwin testified, the crucial question would be "Are you doing a historical perspective on the Bible, . . . or are you actually teaching Genesis and the creation story?" ER 120.

[3]On November 19, 2001, petitioners moved under Rule 60(a), Fed. R. Civ. P., to correct certain factual errors in the district court's Order. On January 28, 2002, the district court granted defendants' motion to correct certain factual errors in its Order. An Amended Order was filed the same day. (Curiously, petitioners do not include this Amended Order in their Petition Appendix.) The judgment previously filed was left undisturbed. Dkt. 104.

Berzon issued a per curiam opinion. In that opinion, the court observed that, under Supreme Court precedent, "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum simply because the subject is discussed from a religious viewpoint." Pet. App. 14. The court concluded that SUSD's "exclusion of Hills's summer camp brochure because it offered Bible classes from a Christian perspective does just that, and therefore constitutes impermissible viewpoint discrimination." *Id.*

The court below also found SUSD's asserted Establishment Clause defense meritless. Pet. App. 16-22. Among other things, the court noted that the community fliers "are certainly not part of the teacher's instruction or curriculum." Pet. App. 18. Also important was the fact that "the brochures are sent home with students so that *their parents* can select extra-curricular activities for their children." Pet. App. 18 (emphasis added). The "express disclaimer" in the brochure, *id.*, the simultaneous distribution of fliers from numerous other organizations, Pet. App. 20, and the fact that the school neither discussed nor drew attention to any particular fliers, *id.*, further mitigated any Establishment Clause concerns. Drawing guidance from this Court, the court of appeals recalled that schools "'do not endorse everything they fail to censor.'" Pet. App. 21 (quoting *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality)). The court concluded that "'[t]he school's proper response is to educate the audience'" about "'the difference between private and public action, . . . rather than squelch the speaker.'" Pet. App. 21 (quoting *Hedges v. Wauconda Community Unit School District No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)).

In sum, the court ruled that SUSD "violated Hills's rights under the Free Speech Clause of the First Amendment," Pet. App. 23, and that there was no valid Establishment Clause defense to SUSD's viewpoint discrimination, Pet. App. 22.

En route to its decision, the court below observed that, while *viewpoint* discrimination is forbidden, schools are not powerless to *limit the scope of the relevant forum* along viewpoint-neutral grounds. Pet. App. 14-16. Thus, the court opined, while SUSD created a forum for *advertising events*, that forum "was never opened for pure discourse," Pet. App. 14 -- such as a religious tract, *id.* (or, for that matter, a poem, an environmental advocacy pamphlet, the Sunday funnies, or some other item that was not a promotion of some event or activity). Thus, SUSD's allowance of fliers promoting "extra-curricular activities that would no doubt be of interest to many schoolchildren," Pet. App. 15, created a forum for fliers "to advertise an event or class," Pet. App. 14, and not necessarily a forum for "pure discourse," *id.* Of course, the court emphasized, a limit on the scope of the forum would be constitutional only "so long as all such viewpoints are treated even-handedly," *id.* *Accord* Pet. App. 23 ("As discussed above, however, the policy still must be applied in a viewpoint neutral manner").[4]

ARGUMENT

I. PETITIONERS RELY ON A MISREADING OF DICTA IN THE OPINION BELOW.

Seizing upon *dicta* in the decision below, petitioner SUSD contends that the court of appeals has *required* SUSD to review

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[4]SUSD erroneously states that the Ninth Circuit "held the [school] District was not required to distribute Hills' brochure as submitted," Pet. at 4. Rather, the court below said, "We do not, however, mean to suggest that the District must distribute Hills's brochure as it was originally proposed," Pet. App. 15. The propositions "We say not X" and "We do not say X" are not logically equivalent. In the case at bar, the court of appeals limited its holding to a condemnation of SUSD's stated grounds for rejecting Hills's flier. Pet. App. 16. The court did not go beyond that holding. Pet. App. 15-16 & n.6.

private literature for, and to censor out, speech "proselytizing" religious ideas. Not only is this inaccurate, the issue it supposedly presents is premature and, moreover, not even controverted -- both petitioners and respondent agree that it is unconstitutional for schools to censor out religious speech. Indeed, this concession by petitioners dooms their half-hearted (Pet. at 10-12) swipe at the merits of the decision below.

First, petitioners' premise is mistaken. The Ninth Circuit said schools *can* limit the fora they create for private speech, not that they *must* do so. Certainly a school district could limit community event announcements, for example, to a "white pages" format that, without commentary, merely lists the name, date, and place of the event and provides contact information. Or a school district could limit the forum, for example, to notices of athletic events. The Ninth Circuit held only that, *if* a school district creates a forum open to certain speech, it cannot exclude "speech discussing otherwise permissible subjects" -- such as summer camp offerings -- "simply because the subject is discussed from a religious viewpoint." Pet. App. 14.

Petitioners' premise is mistaken in another crucial respect: the Ninth Circuit did not direct the imposition of special restrictions on private *religious* speech. Indeed, to do so would not only be unconstitutional, as all parties agree, *see* Pet. at 6, 7, 9, but would run contrary to the whole thrust of the lower court's opinion. Thus, whether a flier containing religious proselytization "exceeds the scope" of a school's forum, Pet. App. 15, hinges not on whether *religious* advocacy is allowed, but rather on whether advocacy *in general* is allowed. "[T]he policy still must be applied in a viewpoint neutral manner." Pet. App. 23.

Second, the issue petitioner seeks to present -- the permissibility of censoring only *proselytization* from a forum for private speech -- even if not already answered in the negative by

this Court's precedents, *see Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), is in any event premature in the present case. SUSD objected to Hills's brochure because of its religious perspective on otherwise permissible topics. SUSD has never imposed a prohibition on advocacy speech, as such, within a flier announcing an event. On the contrary, SUSD has approved fliers containing advocacy, not just of the event advertised, but of ideas in general. *E.g.*, ER 219 (approved YMCA flier) ("Democracy must be learned by each generation"); ER 317 (approved Halloween safety tips flier) ("The last panel of this brochure is VERY IMPORTANT! Sit down with your children and go over these points carefully [because this] can be life saving information for them to learn. . . . [W]e believe children and parents should know how to make this observance as safe and secure as possible"). SUSD in fact never objected to advocacy in Hills's brochure either. *See, e.g.*, Pet. App. 52 (Arizona Camping and Desert Survival course) ("Arizona camping and desert survival is a 'life skills' course, and a *must* for everyone! . . . This course could save your life!!"). Thus, under SUSD's current policy, the "proselytization" of ideas or actions does not disqualify a flier otherwise eligible for distribution. Should SUSD at some future date decide to prohibit the distribution of fliers containing advocacy speech, then at that time the constitutionality of such a restriction would become ripe. It is not ripe now.

Third, there is no controversy between the parties over the unconstitutionality of requiring school officials to act as "religion editors" excising from *private* speech content that is "too religious." SUSD contends that such a requirement would be unconstitutional, Pet. at 6, 7, 9, and respondent agrees. The disagreement between the parties here stems rather from SUSD's misreading of the Ninth Circuit's opinion. SUSD reads the

lower court's *dicta* as requiring admittedly unconstitutional government censorship of private religious speech. As noted above, the Ninth Circuit required no such thing. And even if the court of appeals were understood to have *authorized* (albeit not required) such censorship, the issue would be premature, as SUSD has no obligation to adopt, and has thus far not adopted, a policy forbidding only religious *advocacy* (as opposed to its current ban on *all* private literature with a religious viewpoint). Given that all the parties agree on the unconstitutionality of requiring school officials to "scrutiniz[e] the speech presented and excis[e] religious references," Pet. at 6, it would appear likely that SUSD never will adopt such a policy.

II. PETITIONERS IDENTIFY NO CIRCUIT CONFLICT.

SUSD does not even claim that there is any relevant conflict in the circuits. And while similar issues are pending in at least three other circuits,[5] this fact counsels *against* review, in order to allow further development of the law in the federal circuits. Importantly, such development may well never yield a conflict necessitating Supreme Court review.

III. THE DECISION BELOW WAS CORRECT.

SUSD raises only a feeble challenge to the actual merits of the decision below. Pet. at 10-12. The court of appeals held that, if

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[5]*See Child Evangelism Fellowship of New Jersey v. Stafford Township School Dist.*, No. 03-1101 (3d Cir. argued Sept. 11, 2003) (challenge to denial of equal access to school's literature distribution forum for religious community group); *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, No. 03-1534 (4th Cir. argued Sept. 24, 2003) (same); *Rusk v. Crestview Local Schools*, No. 02-3991 (6th Cir. to be argued Feb. 4, 2004) (Establishment Clause challenge to allowance of equal access to school's literature distribution forum for religious community groups).

a school district creates a forum for the distribution of fliers, to be taken home to parents, promoting events of interest to students, then otherwise permissible fliers cannot be excluded solely because they reflect a religious viewpoint. This is no more than an unremarkable application of this Court's repeated condemnation of discrimination against the religious viewpoint of private speech. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger*; *Good News*. Petitioners themselves concede that the censorship of a private religious viewpoint from the fliers would be unconstitutional. Pet. at 6, 7, 9. Hence, this case does not merit review.

IV. THERE IS NO WARRANT FOR HOLDING THE PETITION HERE PENDING THE PLEDGE CASE.

SUSD suggests that this Court should hold the present case pending the decision in the Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow*, No. 02-1624 (U.S. cert. granted Oct. 14, 2003). But that challenge to *state action* is far afield from the present case involving equal access for *private speakers*. The mere fact that *Newdow* involves schools and the Establishment Clause does not make that case similar to the present one in any material respect.

There is no reason to hold the present position pending *Newdow*.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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